

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

GILES MANLEY,

Petitioner,

v.

WARDEN; DIRECTOR OF NEVADA
DEPARTMENT OF CORRECTIONS, et
al.,

Respondents.

Case No. 3:11-cv-00354-HDM-WGC

ORDER

This is a counseled petition for writ of habeas corpus pursuant to 28 U.S.C § 2254 filed by Nevada state prisoner Giles Manley. (ECF No. 62). The second amended petition comes before the court for consideration of the surviving claims.

I. Background

On May 8, 2002, 22-year-old Isaac Perez, an elementary school custodian, was forced from the school where he was working into his own car by then 16-year-old Giles Manley. With Manley in the back seat, Perez drove. As he approached a traffic stop that was being conducted by Nevada Highway Patrol Trooper Guy Davis, Perez slowly drove his car into the stopped vehicle. Manley shot Perez in the head, neck and upper back five times, killing him, exited the left rear of the vehicle, fired a shot at Davis, hitting Davis in the foot, and fled.

1 Nearby, Manley found a Chevy Tahoe that was occupied by
2 Heriberto Casas, Casas' wife and their infant child. Pointing the
3 gun at Casas' head, Manley ordered Casas to move over to the
4 passenger seat. Casas pleaded with Manley not to shoot and, as he
5 did so, was able to exit the car. Casas' wife grabbed their child
6 and exited the vehicle at the same time. Pointing the gun at Casas'
7 wife and then back to Casas, Manley ordered Casas back into the
8 car. Instead of complying, Casas gave Manley the keys to the car
9 and he and his wife ran.

10 Manley took off in the Chevy and was on the lam for several
11 hours before he was located by law enforcement. Manley then led
12 officers on a high-speed chase through the streets of Las Vegas,
13 a chase that ended only after Manley entered the intersection of
14 Vegas Drive and Decatur against a red light, going upwards of 75
15 miles per hour, and crashed the Chevy into a car driven by Patrick
16 Melia. (Exs. 2 & 3).¹ Melia was pronounced dead at the scene, and
17 Manley was taken into custody directly from the wreckage.

18 The State charged Manley in a twelve-count indictment that
19 included two counts of murder with use of a deadly weapon, one
20 count of attempt murder with use of a deadly weapon, three counts
21 of attempt first-degree kidnapping with use of a deadly weapon,
22 one count of first-degree kidnapping with use of a deadly weapon,
23 and several other related charges. (Ex. 5). The State also filed
24 a notice of intent to seek death penalty. (Ex. 7).

25
26

¹ The exhibits cited in this order, comprising the relevant state
27 court record, are located at ECF Nos. 31-34, 41, 49, 56, 63 and
28 64. The court would note that although exhibits also appear at ECF
 No. 35, the petitioner filed a notice of corrected image for the
 exhibits therein. The corrected images are located at ECF No. 41.

1 Manley's appointed attorneys, Joseph Abood and Nancy Lemcke,
2 had Manley evaluated for competency by Dr. John Paglini. Dr.
3 Paglini deemed Manley competent to stand trial and assist in his
4 defense, but recommended further evaluation - specifically a
5 neuropsychological evaluation to determine whether Manley had
6 suffered any soft tissue damage in the crash ending his crime spree
7 and a complete psychological evaluation. (Ex. 99).

8 Abood and Lemcke then engaged Dr. Gregory Brown to determine
9 whether Manley suffered from mental retardation or had a
10 psychiatric diagnosis. (Ex. 100). Dr. Brown concluded that Manley
11 had an IQ of 80 and explained that, because "Full Scale IQ of 70
12 or lower is indicative of mental retardation," Manley was "in the
13 range of borderline intellectual functioning just above mental
14 retardation but not into the mental retardation level." (*Id.* at
15 6).² Dr. Brown also found Manley was dependent on marijuana, was
16 experiencing high stress levels, and had a GAF in the 70 to 80
17 range but noted no other psychiatric diagnoses. (*Id.*)

18 The defense filed a motion "to Preclude the State From Seeking
19 the Death Penalty Against a Mentally Handicapped Juvenile." (Ex.
20 15). The motion asserted that in addition to borderline
21 intellectual functioning, Manley had poor coordination, several
22 disrupted school experiences, behavior problems, a history of
23 depressed and withdrawn moods, and "almost certainly . . . Fetal
24 Alcohol Syndrome" based on his mother's admission that she used
25 alcohol, marijuana, cocaine and LSD during her first trimester of
26 pregnancy and numerous times after. (*Id.* at 3).³ The court denied

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28 ² Citation is to ECF page number at the top of the page.

³ Citation is to original page of document.

1 the motion. (Exs. 17 & 18). Thereafter, Manley accepted an offer
2 in which he agreed to plead guilty to all counts and accept the
3 maximum sentence on each count in exchange for the death penalty
4 being taken off the table. (Exs. 19 & 20).

5 At the change of plea hearing, Abood set forth the terms of
6 the parties' agreement. (Ex. 20 (Tr. 2)). Before canvassing Manley,
7 the court asked about the negotiations, stating in particular that
8 it "want[ed] to be assured that Mr. Manley knows what he is doing,
9 given his age, and how many times [counsel] talked to him, did his
10 family talk to him." (Ex. 20 (Tr. 2-3)). Abood explained what
11 occurred after the motion to dismiss the death penalty was denied:

12 [T]he question then became what would be the likelihood
13 of the State getting the death penalty in this case? It
14 was our reason and judgment that it was a very good
15 likelihood. So, obviously, faced with a situation like
16 that, Mr. Manley has determined that it would be in his
17 best interest to plead guilty pursuant to this guilty
18 plea agreement in order to avoid the death penalty.

16 (*Id.* at 3). Abood stated that he and Lemcke discussed the case and
17 the plea with Manley and his family many times, that they went
18 over the plea agreement very carefully with Manley and explained
19 to Manley his rights, that they both felt it was in Manley's best
20 interest to plead, and that they believed Manley felt the same way
21 and that he understood the nature of the plea agreement. (*Id.* at
22 3-5).

23 The court then asked Manley his name and age, which Manley
24 answered, and read each of the charges before asking if Manley
25 understood them. Manley replied, "Yes." (*Id.* at 6). Asked how he
26 pled, Manley responded, "Guilty." (*Id.*) Asked if his plea was free
27 and voluntary, Manley stated, "Yeah." (*Id.*) The court asked Manley
28 if he had heard the negotiations as set forth by counsel and

1 whether that was his understanding of the plea agreement, to which
2 Manley responded, "Yeah." (*Id.*) In response to further questions,
3 Manley indicated he had gone over the agreement with counsel and
4 his mom, and that he had read, understood and signed the agreement.
5 (*Id.* at 6-7). The court read each charge in full and asked Manley
6 if he committed that crime, and to each Manley responded yes. (*Id.*
7 at 7-13). The court then accepted the plea as having been entered
8 freely and voluntarily. (*Id.* at 13-14).

9 Less than two months later, at his sentencing hearing, Manley
10 told the court he was not ready to proceed because he wanted to
11 withdraw his plea and go to trial. (Ex. 21 (Tr. 4)). Abood
12 represented to the court that Manley had made a similar statement
13 to him and that, based on their discussions, Abood saw no basis
14 for moving to withdraw the plea. (*Id.* at 5-6). On the grounds that
15 the court saw nothing wrong with plea agreement and defense counsel
16 did not believe a motion to withdraw was appropriate, the court
17 denied the defendant's oral motion and proceeded with sentencing.
18 (*Id.* at 6 *et seq.*). Manley was sentenced, pursuant to the plea
19 agreement, to the statutory maximum term of incarceration on each
20 count, all counts consecutive, including life without the
21 possibility of parole on each of the murder counts. (Ex. 23).

22 The next day, Manley's mother submitted a motion for
23 withdrawal of counsel on Manley's behalf, asserting that defense
24 counsel

25 led the Defendant to believe that he would be able to
26 withdraw his Plea Agreement if and when the Supreme Court
27 passed the law that the death penalty cannot be sought
28 against a juvenile [but that once the Plea Agreement
was signed Defendant was told that he would not be able
to withdraw his guilty plea.

1 (Ex. 22). The court granted the motion to withdraw and appointed
2 new counsel for purposes of appeal. (Ex. 24). At the hearing
3 appointing new counsel, Manley again asked to withdraw plea. The
4 court indicated the request had been denied and was a matter for
5 appeal. (*Id.*)

6 On direct appeal, the Nevada Supreme Court affirmed the denial
7 of Manley's motion to withdraw plea. (Ex. 35).

8 Manley then filed a state postconviction petition in which he
9 argued that he pled guilty on the false promise that he would be
10 allowed to withdraw his plea if the law were to change. (Exs. 37
11 & 39). Without appointing counsel or conducting an evidentiary
12 hearing, the trial court denied relief. (Ex. 43). The Nevada
13 Supreme Court reversed and remanded for both an evidentiary hearing
14 and appointment of counsel. (Ex. 51).

15 On remand, appointed counsel filed an amended petition and,
16 after the evidentiary hearing, a second amended petition. (Exs. 53
17 & 55). Before the evidentiary hearing began, the State believed
18 that Abood would testify that he *had* advised Manley that he could
19 withdraw his plea if the law were changed to bar the execution of
20 minors. (Ex. 54 (Tr. 3-4)).

21 When he took the stand, after he had reviewed his notes in
22 his file, Abood testified, under oath, that he had made no such
23 promise. According to Abood, he and Manley had discussed that the
24 law might someday change to abolish the execution of juveniles.
25 Abood testified that he told Manley that if this were to happen,
26 Manley could ask that his plea be withdrawn. But he denied telling
27 Manley the plea could definitely be withdrawn and said that in
28 fact he told Manley there were no guarantees such a request would

1 be granted. (*Id.* at 13, 15-16, 21-22). Abood did not recall
2 discussing the likelihood that a motion to withdraw plea would be
3 granted, however. (*Id.* at 25).

4 Abood further testified that based on the facts of the case
5 and Manley's juvenile history, he believed there was a substantial
6 likelihood the death penalty would be imposed. (*Id.* at 9-10).
7 Manley also understood he was a likely candidate for the death
8 penalty. (*Id.* at 11-12). As such, Abood's primary goal became
9 saving Manley's life. (*Id.* at 27-28). Abood explained that their
10 intent in pleading

11
12 was to put [Manley] in the best position possible to at
13 least be able to raise the issue that he entered his
14 plea based on a fear of receiving the death penalty, and
15 if the death penalty were ever abolished in the future,
16 he would be in a position to do exactly what he's doing
right now, and that is to request that his plea be
withdrawn based on a change in the law. And we made no
secret about that. We made it clear that we wanted him
to be at least in the position that he could be, at least
request that his plea be withdrawn.

17 (*Id.* at 13).

18 Lemcke also testified. She agreed that their intent was to
19 put Manley in the best position to obtain postconviction relief,
20 whether he went to trial or plea, though she could not remember
21 the specifics of what she or Abood said to Manley in their
22 conversations. (*Id.* at 48-49). She also did not recall discussing
23 the likelihood of success on a motion to withdraw the plea with
24 Manley. (*Id.* at 51). The court then asked:

25 There's a lot of difference in telling a client, listen,
26 if the Supreme Court and Roper says that you're not
allowed to execute juveniles, we tell you right now that
27 you can withdraw your plea to this case, as opposed to
saying, listen, if the Supreme Court comes down, then
28 you could request or ask but there's no guarantees, you
could ask to withdraw your plea. There's a little

1 difference that the Court sees. Could you enlighten the
Court has [sic] to what happened here?

2 (*Id.* at 59). Lemcke responded: "I cannot imagine that either myself
3 or Mr. Abood under any circumstance would say definitely you can
4 do this just based on - we guarantee you as your lawyers that you
5 will be able to withdraw your plea. That representation I cannot
6 imagine would ever have been made." (*Id.* at 59-60). Lemcke also
7 testified that she went through the plea agreement carefully with
8 Manley and asked him to restate things in his own words so she
9 knew he understood it. (*Id.* at 50).

10 Finally, the DA assigned to Manley's case, Christopher Lalli,
11 testified. Lalli agreed that based on the circumstances of the
12 case, and Manley's background which included committing sexual
13 offenses on his younger sisters as a juvenile, that he believed
14 Manley was likely to be sentenced to death. (*Id.* at 64-65). But he
15 testified that he was willing to not seek the death penalty in
16 light of Manley's dysfunctional childhood and youth and on the
17 assurance that Manley would "never ever be released from custody."
18 (*Id.* at 66). Lalli acknowledged that he and Abood had conversations
19 about Manley seeking to withdraw his plea if the law were to
20 change, but he stated he "absolutely did not" agree that Manley
21 could withdraw his plea if the law changed and "would not have
22 agreed to anything like that." (*Id.* at 67).

23 After the evidence was submitted, Manley's postconviction
24 counsel told the court that Abood's testimony "absolutely shocked"
25 him as it was totally contrary to what Abood said he was going to
26 say. (*Id.* at 71).

27 The court continued the hearing for further argument, during
28 which counsel for the State again affirmed that based on a

1 conversation with Abood a couple weeks before the hearing, "it was
2 [his] understanding . . . that [Abood] would testify that he had
3 advised Mr. Manley that he could withdraw his plea if the law was
4 changed, that was my understanding, that was Mr. Goldstein's
5 understanding." (Ex. 57 (Tr. 5)). But, the State's attorney
6 continued:

7 I will say on Mr. Abood's behalf that I know from talking
8 with him the morning of the hearing before we came in
9 court that he reviewed the files after those
10 conversations with Mr. Goldstein and myself. Now,
11 whether his review of the file jogged his memory and
12 caused him to testify differently, or whether he changed
his testimony for some other reason, I don't know but
Ms. Lemke [sic] and Mr. Lally's [sic] testimony was
totally consistent with the testimony that Mr. Abood
gave at the hearing.

13 (*Id.* at 5-6). Postconviction counsel also submitted a sworn
14 affidavit stating that Abood had "unequivocally stated that he did
15 in fact advise Manley that he would be able to withdraw his plea"
16 if the State of Nevada abolished the death penalty for juvenile
17 offenders. (Ex. 55 at 11-12). He further stated: "I felt there was
18 absolutely no ambiguity in Mr. Abood's words and I was utterly
19 certain that Mr. Abood was telling me had had advised Mr. Manley
20 accordingly." (*Id.* at 12).

21 The trial court found Abood credible that he did not promise
22 Manley he could withdraw his plea and denied Manley's petition.
23 (Ex. 58). The Nevada Supreme Court affirmed. (Ex. 65).

24 Thereafter, Manley pursued another state court postconviction
25 petition, which was dismissed as procedurally barred. (Exs. 71 &
26 80). The Nevada Supreme Court affirmed. (Ex. 86).

27 In May 2011, Manley initiated the instant federal habeas
28 action. Counsel was appointed, and in December 2011, had Manley

1 evaluated by Dr. Antolin Llorente, a licensed psychologist and
2 clinical neuropsychologist. Like Dr. Brown earlier found, Dr.
3 Llorente concluded that Manley functioned in the borderline
4 category just above mental retardation. But, Dr. Llorente
5 concluded, given his cognitive deficits, substance abuse, history
6 of mental illness, lack of family support, and likely organic brain
7 damage, Manley could not have understood the plea agreement or the
8 consequences of his plea. (Ex. 101 at 24-25).

9 Dr. Llorente's opinion was included in a third petition filed
10 with the state courts during the pendency of this action. (Ex.
11 88). The trial court dismissed that petition as procedurally
12 barred, and the Nevada Supreme Court affirmed. (Exs. 139 & 147).

13 The surviving claims of the second amended petition are now
14 before this court for either merits review or, in one case, for a
15 determination as to whether Manley's procedural default can be
16 excused.

17 **II. Standard**

18 **A. Merits**

19 28 U.S.C. § 2254(d) provides the legal standards for this
20 Court's consideration of the merits of the petition in this case:

21 An application for a writ of habeas corpus on behalf of
22 a person in custody pursuant to the judgment of a State
23 court shall not be granted with respect to any claim
that was adjudicated on the merits in State court
proceedings unless the adjudication of the claim -

24 (1) resulted in a decision that was contrary to, or
25 involved an unreasonable application of, clearly
26 established Federal law, as determined by the
Supreme Court of the United States; or

27 (2) resulted in a decision that was based on an
28 unreasonable determination of the facts in light of
the evidence presented in the State court
proceeding.

1 AEDPA "modified a federal habeas court's role in reviewing
2 state prisoner applications in order to prevent federal habeas
3 'retrials' and to ensure that state-court convictions are given
4 effect to the extent possible under law." *Bell v. Cone*, 535 U.S.
5 685, 693-694 (2002). This court's ability to grant a writ is
6 limited to cases where "there is no possibility fairminded jurists
7 could disagree that the state court's decision conflicts with
8 [Supreme Court] precedents." *Harrington v. Richter*, 562 U.S. 86,
9 102 (2011). The Supreme Court has emphasized "that even a strong
10 case for relief does not mean the state court's contrary conclusion
11 was unreasonable." *Id.* (citing *Lockyer v. Andrade*, 538 U.S. 63, 75
12 (2003)); see also *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011)
13 (describing the AEDPA standard as "a difficult to meet and highly
14 deferential standard for evaluating state-court rulings, which
15 demands that state-court decisions be given the benefit of the
16 doubt") (internal quotation marks and citations omitted.)

17 A state court decision is contrary to clearly established
18 Supreme Court precedent, within the meaning of 28 U.S.C. § 2254,
19 "if the state court applies a rule that contradicts the governing
20 law set forth in [the Supreme Court's] cases" or "if the state
21 court confronts a set of facts that are materially
22 indistinguishable from a decision of [the Supreme Court] and
23 nevertheless arrives at a result different from [the Supreme
24 Court's] precedent." *Andrade*, 538 U.S. 63 (quoting *Williams v.*
25 *Taylor*, 529 U.S. 362, 405-06 (2000), and citing *Bell*, 535 U.S. at
26 694).

27 A state court decision is an unreasonable application of
28 clearly established Supreme Court precedent, within the meaning of

1 28 U.S.C. § 2254(d), "if the state court identifies the correct
2 governing legal principle from [the Supreme Court's] decisions but
3 unreasonably applies that principle to the facts of the prisoner's
4 case." *Andrade*, 538 U.S. at 74 (quoting *Williams*, 529 U.S. at 413).
5 The "unreasonable application" clause requires the state court
6 decision to be more than incorrect or erroneous; the state court's
7 application of clearly established law must be objectively
8 unreasonable. *Id.* (quoting *Williams*, 529 U.S. at 409).

9 To the extent that the state court's factual findings are
10 challenged, the "unreasonable determination of fact" clause of §
11 2254(d)(2) controls on federal habeas review. *E.g.*, *Lambert v.*
12 *Blodgett*, 393 F.3d 943, 972 (9th Cir. 2004). This clause requires
13 that the federal courts "must be particularly deferential" to state
14 court factual determinations. *Id.* The governing standard is not
15 satisfied by a showing merely that the state court finding was
16 "clearly erroneous." *Id.* at 973. Rather, AEDPA requires
17 substantially more deference:

18 [I]n concluding that a state-court finding is
19 unsupported by substantial evidence in the state-court
20 record, it is not enough that we would reverse in similar
21 circumstances if this were an appeal from a district
22 court decision. Rather, we must be convinced that an
appellate panel, applying the normal standards of
appellate review, could not reasonably conclude that the
finding is supported by the record.

23 *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004); see also
24 *Lambert*, 393 F.3d at 972.

25 Under 28 U.S.C. § 2254(e)(1), state court factual findings
26 are presumed to be correct unless rebutted by clear and convincing
27 evidence. The petitioner bears the burden of proving by a
28 preponderance of the evidence that he is entitled to habeas relief.

1 *Cullen*, 563 U.S. at 181. The state courts' decisions on the merits
2 are entitled to deference under AEDPA and may not be disturbed
3 unless they were ones "with which no fairminded jurist could
4 agree." *Davis v. Ayala*, - U.S. -, 135 S. Ct. 2187, 2208 (2015).

5 B. Procedural Default

6 A procedural default may be excused only if "a constitutional
7 violation has probably resulted in the conviction of one who is
8 actually innocent," or if the prisoner demonstrates cause for the
9 default and prejudice resulting from it. *Murray v. Carrier*, 477
10 U.S. 478, 496 (1986).

11 To demonstrate cause for a procedural default, the petitioner
12 must "show that some objective factor external to the defense
13 impeded" his efforts to comply with the state procedural rule.
14 *Murray*, 477 U.S. at 488. For cause to exist, the external
15 impediment must have prevented the petitioner from raising the
16 claim. See *McCleskey v. Zant*, 499 U.S. 467, 497 (1991).

17 With respect to the prejudice prong, the petitioner bears
18 "the burden of showing not merely that the errors [complained of]
19 constituted a possibility of prejudice, but that they worked to
20 his actual and substantial disadvantage, infecting his entire
21 [proceeding] with errors of constitutional dimension." *White v.*
22 *Lewis*, 874 F.2d 599, 603 (9th Cir. 1989) (citing *United States v.*
23 *Fraday*, 456 U.S. 152, 170 (1982)).

24 **III. Analysis**

25 A. Ground 1(A)

26 In Ground 1(A), Manley asserts that his plea was not knowing,
27 intelligent and voluntary, in violation of his Fifth Amendment due
28 process rights. (ECF No. 62 at 10).

1 The federal constitutional guarantee of due process of law
2 requires that a guilty plea be knowing, intelligent and voluntary.
3 *Brady v. United States*, 397 U.S. 742, 748 (1970); *Boykin v.*
4 *Alabama*, 395 U.S. 238, 242 (1969); *United States v. Delgado-Ramos*,
5 635 F.3d 1237, 1239 (9th Cir. 2011). "The voluntariness of [a
6 petitioner's] guilty plea can be determined only by considering
7 all of the relevant circumstances surrounding it." *Brady*, 397 U.S.
8 at 749. Those circumstances include "the subjective state of mind
9 of the defendant" *Iaea v. Sunn*, 800 F.2d 861, 866 (9th
10 Cir. 1986).

11 Addressing the "standard as to the voluntariness of guilty
12 pleas," the Supreme Court has stated:

13 (A) plea of guilty entered by one fully aware of the
14 direct consequences, including the actual value of any
15 commitments made to him by the court, prosecutor, or his
16 own counsel, must stand unless induced by threats (or
17 promises to discontinue improper harassment),
misrepresentation (including unfulfilled or
unfulfillable promises), or perhaps by promises that are
by their nature improper as having no proper
relationship to the prosecutor's business (e.g. bribes).
18 *Brady*, 397 U.S. at 755 (quoting *Shelton v. United States*, 246 F.2d
19 571, 572 n.2 (5th Cir. 1957) (en banc), *rev'd on other grounds*,
20 356 U.S. 26 (1958)); see also *North Carolina v. Alford*, 400 U.S.
21 25, 31 (1970) (noting that the "longstanding test for determining
22 the validity of a guilty plea is 'whether the plea represents a
23 voluntary and intelligent choice among the alternative courses of
24 action open to the defendant.'"); *Allen v. Quinn*, 383 Fed. App'x
25 679, 680 (9th Cir. 2010) ("Under Supreme Court precedent, a plea
26 is voluntary so long as it is entered by one fully aware of the
27 direct consequences, and not induced by threats,
28 misrepresentation, or improper promises.").

1 In *Blackledge v. Allison*, 431 U.S. 63 (1977), the Supreme
2 Court addressed the evidentiary weight of the record of a plea
3 proceeding when the plea is subsequently subject to a collateral
4 challenge. While noting that the defendant's representations at
5 the time of his guilty plea are not "invariably insurmountable"
6 when challenging the voluntariness of his plea, the court stated
7 that, nonetheless, the defendant's representations, as well as any
8 findings made by the judge accepting the plea, "constitute a
9 formidable barrier in any subsequent collateral proceedings" and
10 that "[s]olemn declarations in open court carry a strong
11 presumption of verity." *Blackledge*, 431 U.S. at 74; see also *Muth*
12 *v. Fondren*, 676 F.3d 815, 821 (9th Cir. 2012); *Little v. Crawford*,
13 449 F.3d 1075, 1081 (9th Cir. 2006).

14 "A habeas petitioner bears the burden of establishing that
15 his guilty plea was not voluntary and knowing." *Little*, 449 F.3d
16 at 1080.

17 On direct appeal, the Nevada Supreme Court found Manley's
18 plea was knowing, voluntary and intelligent:

19 The record before this court belies Manley's claim that
20 the district court failed to ensure his plea was entered
21 voluntarily and knowingly. . . . In the written plea
22 agreement, Manley acknowledged that he agreed to plead
23 guilty, understood the consequences of his plea,
24 understood the rights and privileges he waived by
25 pleading guilty, and that he voluntarily signed the
26 agreement after consulting with counsel. During the
27 district court's plea canvass, Manley's trial counsel,
28 Joseph Abood, discussed the sequence of events leading
to Manley's decision to enter a plea agreement. Abood
stated that he and co-counsel spoke extensively with
Manley, shared his discovery with him, and answered his
questions. Abood also stated that he had thoroughly
reviewed the written plea agreement with Manley,
explaining to Manley his rights, the possible penalties,
and the specifics of each crime. Manley acknowledged
that he read and understood the plea agreement, he went
over the plea agreement with counsel, he understood the

1 charges against him, and that he freely and voluntarily
2 entered his guilty plea. Before accepting Manley's plea,
3 the district court read each count on the amended
4 indictment and Manley acknowledged that each count was
correct. Based on the totality of the circumstances, we
conclude that Manley's guilty plea agreement was entered
voluntarily, knowingly, and intelligently.

5 (Ex. 35 at 5).

6 Manley argues that the state court's conclusion was
7 objectively unreasonable. He asserts that his plea was not knowing,
8 voluntary and intelligent because he did not understand the
9 consequences of the plea, and he asserts he did not understand the
10 consequences because (1) the plea canvass was infirm in light of
11 his severe cognitive limitations, and (2) he pled based on an
12 improper, and false, promise.

13 i. Ground 1(A) (1)

14 Manley argues that the court did not ask enough questions to
15 confirm that he understood the agreement and the consequences of
16 his plea, especially given that he was a juvenile with severe
17 cognitive defects. (ECF No. 62 at 12). Specifically, he argues,
18 the court directed most of its questions to his attorney, rather
19 than to Manley himself, and the few questions directed to Manley
20 were insufficient to establish he truly understood the agreement.
21 (*Id.* at 12-14). He argues that Nevada Supreme Court did not
22 consider the impact of his cognitive limitations in reaching its
23 conclusion, and that its conclusion that his plea was knowing and
24 voluntary is therefore objectively unreasonable.

25 There is "no fixed colloquy, no set of sequence or number of
26 questions and answers, no minimum length of hearing, no Talismanic
27 language that the judge is required to use." *Stewart v. Peters*,
28 958 F.2d 1379, 1384 (7th Cir. 1992); see also *Zepeda v. Figueroa*,

1 2014 WL 2605360, at *3 (S.D. Cal. June 11, 2014); *Dietrich v.*
2 *Czerniak*, 2007 WL 3046481, at *7 (D. Or. Oct. 7, 2007). The canvass
3 of Manley adopted Abood's description of the plea and the reasons
4 why Manley was entering it, which occurred in Manley's presence
5 and which Manley affirmed was correct. Abood also advised the court
6 that he and Lemcke had gone over the plea agreement very carefully
7 with Manley and that Abood believed Manley understood it and agreed
8 it was in his best interest. In response to questions of the court,
9 Manley affirmed that he understood the charges, had discussed the
10 agreement with counsel, and had read and understood the agreement.
11 Manley affirmed that he had committed each crime charged and that
12 his plea was free and voluntary.

13 The canvass itself must also be viewed in the context of the
14 plea agreement, which Manley signed. The agreement clearly set
15 forth the charges and the parties' agreement as to the sentence.
16 It also stated that Manley was voluntarily entering his plea and
17 was not doing so on the basis of any promises of leniency by anyone
18 other than the promises set forth in the agreement. (Ex. 19 at 8).

19 The state courts were not objectively unreasonable in finding
20 the trial court's canvass sufficient to establish that Manley was
21 aware of and understood the charges against him and the possible
22 penalties he faced, that he pled guilty to every charge in exchange
23 for the death penalty being abandoned by the State, and that he
24 was freely and voluntarily entering his plea.

25 This conclusion stands even in light of Manley's status as a
26 juvenile with cognitive limitations. Two doctors evaluated Manley
27 before he entered his plea. Manley was found competent to
28 understand the proceedings and able to function intellectually,

1 albeit in borderline territory, without significant psychiatric
2 diagnosis. Manley's attorneys took extra care to discuss and
3 explain the charges and plea to him in light of his cognitive
4 limitations. While Manley uses Dr. Llorente's more recent
5 evaluation in 2011 to cast doubt on his ability to comprehend the
6 plea, an evaluation that took place nine years after the plea was
7 entered is insufficient to rebut the conclusions by two doctors
8 who evaluated Manley contemporaneously with his plea and whose
9 evaluations support a conclusion Manley was competent to enter a
10 plea. Finally, no evidence before either this court or the state
11 courts exists to show that Manley was under the influence of
12 medications that made it impossible for him to knowingly enter a
13 plea. Manley in fact averred in the plea agreement that he was not
14 under the influence of any such substances. (Ex. 19 at 8). In sum,
15 the canvass did not call into doubt the state courts' conclusion
16 that Manley entered his plea knowingly, intelligently and
17 voluntarily and the totality of the circumstances sufficiently
18 supports the state courts' conclusion in this regard.

19 ii. Ground 1(A)(2)

20 Manley asserts that he pleaded guilty only because counsel
21 said he would be allowed to withdraw the plea if the law changed
22 to bar execution of juveniles, and thus because his plea was based
23 on this improper promise, it was not knowing and voluntary. (ECF
24 No. 62 at 14). The Nevada Supreme Court addressed this claim as
25 follows:

26 Manley contends on appeal that the district court's
27 findings on this matter were erroneous. He asserts that
28 Deputy Public Defender Abood's statements prior to and
during the evidentiary hearing regarding the advice he
gave Manley about the plea, and whether he could withdraw

1 it if the law ever changed, . . . were contradictory. He
2 maintains that the district court improperly denied his
request to withdraw the guilty plea. We disagree.

3 . . .

4 Here, Abood testified at the evidentiary hearing that he
5 sought to place Manley in "the best position possible"
6 to seek to withdraw his guilty plea if the law regarding
the execution of juvenile offenders changed and advised
7 Manley that "he could ask to withdraw his plea." But
Abood also advised Manley that "there was obviously no
8 guarantees" that he could withdraw his plea. If there
had been such a guarantee, Abood continued, it would
have been a part of the plea negotiations.

9 Deputy Public Defender Lemcke testified that she had no
specific recollection of whether Manley was told that he
10 could withdraw his plea if the law changed, but she
generally corroborated Abood's testimony. And Deputy
11 District Attorney Lalli testified that he "absolutely
did not and would not have agreed" to the guilty plea if
12 it was conditioned upon Manley being able to withdraw it
if the law changed.

13 Even if some of Abood's statements and testimony on this
14 matter were inconsistent or unclear, the district court
found Abood to be a credible witness, and Abood testified
15 unequivocally that he made "no guarantees" to Manley
that he could withdraw his plea if the law regarding the
16 execution of juvenile offenders ever changed.
Substantial evidence supports this finding, which
17 includes the testimony of Lemcke and Lalli. And the
district court's finding on this matter is not clearly
18 wrong. We therefore defer to it.

19 (Ex. 65 at 2-3).⁴

20 In short, the Nevada Supreme Court concluded Abood had not
21 promised Manley could withdraw his plea because Abood denied making
22 such a promise and the trial court found him credible. Manley
23 argues that this conclusion, and the trial court's finding that
24 Abood was credible, were objectively unreasonable.

25 Manley argues that it is clear that he believed he had been
26 promised he could withdraw his plea if the law were to change. He
27 points to his statements at sentencing, his mother's letter to the

28 ⁴ Citation is to original page of document.

1 court, his motion to withdraw Abood as counsel, and Abood's letter
2 to Manley that, Manley claims, reflects Manley's understanding.
3 (Exs. 21, 22, 111 & 114). He argues that Abood was the only person
4 who testified that there was no promise and that such testimony
5 ran counter to the testimonies or experiences of everyone else.
6 Finally, he argues, Lemcke and Lalli's testimonies did not support
7 Abood's testimony, contrary to the finding of the state courts.

8 The state courts were not objectively unreasonable in finding
9 Abood's testimony credible. The State's attorney noted that Abood
10 had not reviewed his notes when he made his initial representation
11 and that Abood had reviewed his notes prior to his sworn testimony
12 in court. The letters written by Manley and his mother amount to
13 self-serving evidence, and Abood's letter reflects only that
14 Manley and his mother were asserting such a promise had been made
15 - not that their assertion was necessarily true. Further, contrary
16 to Manley's assertion, Abood's testimony was in fact supported by
17 that of Lemcke and Lalli. Not only did Lemcke not contradict Abood,
18 she also stated that they never would have promised Manley an
19 absolute right to withdraw. And while Lalli's testimony directly
20 establishes only that Manley never asked the State to guarantee
21 his right to withdraw his plea, it is at least circumstantial
22 evidence suggesting that a guarantee was not part of Abood's
23 discussions with Manley. Finally, while Manley challenges Abood's
24 credibility by alleging that even the advice Abood claims to have
25 given was itself ineffective, as will be discussed *infra*, the
26 advice was not ineffective. The state courts were thus not
27 objectively unreasonable in finding that Abood did not promise
28

1 Manley he would be able to withdraw his plea. Manley is not
2 therefore entitled to relief on Ground 1(A)(2) of the petition.

3 B. Ground Two

4 Ground Two asserts two claims of ineffective assistance of
5 counsel. First, Manley asserts that counsel failed to advise him
6 of the consequences of the plea. Second, he asserts that counsel
7 failed to sufficiently investigate the extent of his mental
8 impairments. Manley asserts that if counsel had advised him
9 properly of the consequences of the plea and had sufficiently
10 investigated his mental impairments, it is reasonably likely he
11 would have rejected the plea and proceeded to trial or received a
12 better plea deal. (ECF No. 62 at 21-28).

13 Ineffective assistance of counsel claims are governed by
14 *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*,
15 a petitioner must satisfy two prongs to obtain habeas relief—
16 deficient performance by counsel and prejudice. 466 U.S. at 687.
17 With respect to the performance prong, a petitioner must carry the
18 burden of demonstrating that his counsel's performance was so
19 deficient that it fell below an "objective standard of
20 reasonableness." *Id.* at 688. "'Judicial scrutiny of counsel's
21 performance must be highly deferential,' and 'a court must indulge
22 a strong presumption that counsel's conduct falls within the wide
23 range of reasonable professional assistance.'" *Knowles v.*
24 *Mirzayance*, 556 U.S. 111, 124 (2009) (citation omitted). In
25 assessing prejudice, the court "must ask if the defendant has met
26 the burden of showing that the decision reached would reasonably
27 likely have been different absent [counsel's] errors." *Id.* at 696.

1 "We are particularly cautious about second-guessing counsel
2 when a plea is entered." *Hager v. Cate*, 472 Fed. App'x 522, 523
3 (9th Cir. 2012) (citing *Premo v. Moore*, 562 U.S. 115, 131-32
4 (2011)).

5 i. Ground 2(A)

6 Manley asserts that Abood failed to advise him of the
7 consequences of the plea because he incorrectly promised Manley
8 that he could withdraw his plea if the law changed. (ECF No. 62 at
9 22). As the court previously found, the state courts concluded
10 that Abood did not promise Manley that he could withdraw his plea,
11 and their conclusion was not objectively unreasonable.

12 Manley asserts that even if Abood merely told him he would be
13 in a good position to withdraw his plea if the law changed, that
14 advice was ineffective. Any lack of legal precedent to support
15 counsel's advice is not dispositive in the context of this case.
16 There was a very real chance - in counsel's estimation a likely
17 chance - that Manley would be sentenced to death if he went to
18 trial. There was no guarantee that the death penalty for juveniles
19 would be overturned. The only plea agreement the State would agree
20 to was one that put Manley in prison for the rest of his life.
21 With a high chance of death and no possibility of receiving a more
22 favorable plea, there was little Abood could have done to put
23 Manley in a better position than he did. Thus, his advice that, by
24 pleading guilty to the charges agreed to in the plea agreement,
25 Manley was placed in the "best" position, was within the wide range
26 of reasonable representation.

27 Manley has not demonstrated deficient performance and is not
28 therefore entitled to relief on Ground 2(A).

1 ii. Ground 2(B)

2 Manley asserts that Abood was also ineffective for failing to
3 adequately investigate the extent of his cognitive defects. (ECF
4 No. 62 at 26). He argues that if counsel had adequately
5 investigated his psychological history and condition, he would not
6 have advised him to enter the plea.

7 Manley argues that despite Dr. Paglini's recommendation that
8 he receive a full psychological evaluation, the only follow-up
9 evaluation he received was for intellectual functioning. Manley
10 asserts that had Abood done an adequate investigation, he would
11 have discovered that Manley had a history of depression, bipolar
12 disorder, PTSD, chronic drug abuse and physical abuse and neglect.
13 He would also have discovered, as Dr. Llorente concluded, that
14 Manley was unable to understand the consequences of pleading
15 guilty. This information, Manley argues, would have provided
16 powerful mitigation evidence to persuade the State to take the
17 death penalty off the table or to convince the jury not to impose
18 the death penalty, and would have established that Manley could
19 not have knowingly and voluntarily entered a guilty plea.⁵

20 Respondents argue that counsel had Manley evaluated for
21 competency -- he was found competent -- and for any psychiatric
22 conditions, and none was found. They assert that Manley has not
23 established that any further evaluations would have led to a

24
25 ⁵ Manley did not raise this claim until his third state petition,
26 which was dismissed as procedurally barred. Respondents have not
27 moved to dismiss the claim as procedurally defaulted, however, so
28 any procedural default defense is waived, and the court will
address the claim on the merits. See *Vang v. Nevada*, 329 F.3d 1069,
1073 (9th Cir. 2003).

1 different result - *i.e.*, that he would have rejected the plea and
2 elected to proceed to trial.

3 When there is no "objective indication" that a defendant has
4 a mental illness or brain damage, we cannot label counsel
5 "ineffective for failing to pursue this avenue of mitigation."
6 *Earp v. Cullen*, 623 F.3d 1065, 1076 (9th Cir. 2010) (quoting
7 *Gonzalez v. Knowles*, 515 F.3d 1006, 1015 (9th Cir. 2008)). Counsel
8 had Manley evaluated for competency and then for psychiatric issues
9 and intellectual functioning. Manley was found competent, not
10 mentally retarded, and with no indication of psychiatric issues.
11 Following Dr. Brown's evaluation, there did not remain an objective
12 indicator that further evaluation was necessary. Counsel's failure
13 to further pursue evaluation did not fall outside the wide range
14 of reasonable representation.

15 Further, most of what Manley argues counsel should have
16 discovered through further evaluation was in fact presented to the
17 court in the motion to dismiss the death penalty charge for a
18 mentally handicapped individual. Manley cannot therefore
19 demonstrate prejudice.

20 Manley is not entitled to relief on Ground 2(B) of the
21 petition.

22 C. Ground Four

23 In Ground Four, Manley asserts that he was denied his right
24 to conflict-free counsel because Abood could not effectively argue
25 for withdrawal of the plea without admitting to his own
26 ineffectiveness - *i.e.*, that he made Manley a false and misleading
27 promise to induce Manley to enter the plea. (ECF No. 62 at 31-35).
28 This claim is procedurally defaulted, and the court previously

1 reserved on the question of cause and prejudice, which it will now
2 address.

3 Manley asserts cause based on the Supreme Court case of
4 *Martinez v. Ryan*, 566 U.S. 1 (2012). *Martinez* created a narrow,
5 equitable rule that allows petitioners to, in some cases, establish
6 cause for a procedural default where the failure to raise a
7 substantial claim of ineffective assistance of trial counsel in
8 initial-review collateral proceedings is due to the absence or
9 ineffective assistance of post-conviction counsel. *Id.* at 16-17.

10 Manley has not demonstrated that postconviction counsel
11 rendered ineffective assistance and thus has not established cause
12 for the default of Ground Four.

13 "Experienced advocates since time beyond memory have
14 emphasized the importance of winnowing out weaker arguments on
15 appeal and focusing on one central issue if possible, or at most
16 on a few key issues." *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983).
17 Postconviction counsel raised the essence of this claim -- that
18 counsel made an improper promise -- in the state habeas petition.
19 There was no greater chance of success on a claim that Abood
20 labored under a conflict of interest because of the improper
21 promise than on the claim that the plea was invalid because of the
22 promise; both depended on the court finding that Abood had made
23 such a promise. Counsel was not therefore deficient in failing to
24 raise this claim in postconviction proceedings. For the same
25 reason, Manley cannot demonstrate prejudice. Because the state
26 courts found Abood had made no such promise, there is no reasonable
27 likelihood the courts would have found that Abood operated under
28 a conflict of interest.

1 As Manley has not demonstrated cause and prejudice for the
2 default of this claim, Ground Four will be dismissed.

3 D. Ground Five

4 In Ground Five, Manley asserts that his Eighth Amendment right
5 to be free from cruel and unusual punishment is violated by his
6 sentence of life without the possibility of parole. (ECF No. 62 at
7 36).

8 In *Graham v. Florida*, the Supreme Court held that a sentence
9 of life without parole imposed on a juvenile for a nonhomicide
10 offense is cruel and unusual punishment in violation of the Eighth
11 Amendment. 560 U.S. 48, 82 (2010). Later, in *Miller v. Alabama*,
12 the Court held that "mandatory life without parole for those under
13 the age of 18 at the time of their crimes violates the Eighth
14 Amendment's prohibition on 'cruel and unusual punishments.'" 567
15 U.S. 460, 465 (2012). It further made clear that "*Graham's*
16 reasoning implicates any life-without-parole sentence imposed on
17 a juvenile, even as its categorical bar relates only to nonhomicide
18 offenses." *Id.* at 473. *Miller* further held that before imposing
19 a sentence of life without the possibility of parole on a juvenile,
20 a sentencing court must "how children are different, and how those
21 differences counsel against irrevocably sentencing them to a
22 lifetime in prison." *Id.* at 480.

23 In *Montgomery v. Louisiana*, the Supreme Court held that *Miller*
24 was retroactively applicable on collateral review. 577 U.S. 190
25 (2016). It also held that "*Miller* did bar life without parole . .
26 . for all but the rarest of juvenile offenders, those whose crimes
27 reflect permanent incorrigibility." *Id.* at 209. However, the
28 Supreme Court recently made clear that sentencing courts are not

1 required to make any specific finding of permanent incorrigibility
2 or any on-the-record explanation with an implicit finding of
3 permanent incorrigibility. *Jones v. Mississippi*, - U.S. -, 141 S.
4 Ct. 1307, 1314-15, 1319-21 (2021). Rather, it is enough that a
5 sentencing court has the discretion to consider "an offender's
6 youth and attendant characteristics" and the discretion to
7 sentence the offender to a term less than life without parole in
8 order to satisfy *Miller*. *Id.* at 1316-18.

9 Manley alleged in the state courts that his sentence violated
10 *Miller*. Manley argued that his life without parole sentence was
11 mandatory and that he never received an individualized sentencing
12 hearing at which the court considered his youth in determining his
13 sentence.

14 The Nevada Supreme Court held that there was no mandatory
15 sentencing scheme at the time Manley committed his crimes and thus
16 his sentence was not unconstitutional under *Miller*. (Ex. 153 at 1-
17 2). The court did not address Manley's remaining arguments.

18 The state courts were not objectively unreasonable in finding
19 that Manley's sentence did not violate the Eighth Amendment.
20 Neither the categorical bar of *Graham* nor the categorical of *Miller*
21 prohibits Manley's sentence. Manley committed two murders and was
22 not sentenced pursuant to a sentencing scheme that mandated life
23 without the possibility of parole.⁶ See Nev. Rev. Stat. §

24 ⁶ Manley's argument that his sentence was mandatory because it was
25 pursuant to a binding plea agreement, and because the Nevada
26 Supreme Court's generally refuses to overturn sentences of life
27 without the possibility of parole, is not persuasive. A sentence
28 that is required pursuant to a mandatory sentencing scheme is
fundamentally different from a sentence that Manley agreed to and
which, although it would have possibly impacted the plea agreement,
the court could have deviated from if it had wished. There is no

200.030(4)(b). Moreover, Manley received a sentencing hearing at which the court clearly considered his age in determining his sentence. The court began by stating that Manley was lucky to get the plea he did because "if the Court ever seen a crime that warranted the death sentence, this would be such a crime." (Ex. 21 (Tr. 18)). It then noted Manley's abusive childhood and early drug abuse before stating that "as a juvenile" Manley had received six chances at Probation and had squandered them all. Because of that and the heinous nature of his crimes, the court explained, Manley was, at the age of 17, now facing the rest of his life behind bars. Taken as a whole, the court's statements indicate consideration of the defendant's youth prior to the court's decision to not deviate from the parties' agreed-upon sentence.

As Manley's sentence and the procedure used to arrive at it complies with all relevant Supreme Court precedent, the state courts' rejection of this claim was neither contrary to, nor an unreasonable determination of, clearly established federal law. Manley is not entitled to relief on Ground 5 of the petition.

IV. Certificate of Appealability

In order to proceed with an appeal, Manley must receive a certificate of appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001). Generally, a petitioner must make "a substantial showing of the denial of a constitutional right" to

authority to support Manley's assertion that appellate decisions have any bearing on the question of whether a sentence is actually, or in effect, mandatory.

1 warrant a certificate of appealability. *Allen*, 435 F.3d at 951; 28
2 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84
3 (2000). "The petitioner must demonstrate that reasonable jurists
4 would find the district court's assessment of the constitutional
5 claims debatable or wrong." *Allen*, 435 F.3d at 951 (quoting *Slack*,
6 529 U.S. at 484). In order to meet this threshold inquiry, Manley
7 has the burden of demonstrating that the issues are debatable among
8 jurists of reason; that a court could resolve the issues
9 differently; or that the questions are adequate to deserve
10 encouragement to proceed further. *Id.*

11 The court has considered the issues raised by Manley, with
12 respect to whether they satisfy the standard for issuance of a
13 certificate of appealability and determines that none meet that
14 standard. Accordingly, Manley will be denied a certificate of
15 appealability.

16 **V. Conclusion**

17 In accordance with the foregoing, IT IS THEREFORE ORDERED
18 that the second amended petition for writ of habeas corpus relief
19 (ECF No. 62) is DENIED, and this action is therefore DISMISSED
20 WITH PREJUDICE.

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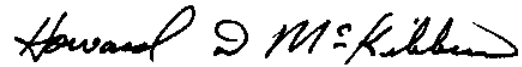
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1 IT IS FURTHER ORDERED that Manley is DENIED a certificate of
2 appealability, for the reasons set forth above.

3 The Clerk of Court shall enter final judgment accordingly and
4 close this case.

5 IT IS SO ORDERED.

6 DATED: This 27th day of July, 2021.

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9 UNITED STATES DISTRICT JUDGE
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